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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 7

JOHN JOSEPH KILLIAN

vs.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S SECOND SUPPLEMENTAL BRIEF.

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THE DONNELLEY-GARRETT PRINTING COMPANY, CHICAGO 58

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Supreme Court of the United States

OCTOBER TERM, 1960.

No. 141.

JOHN JOSEPH KILLIAN

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1. The purpose of this brief is to place before the Court the impact of the opinions in *Campbell* v. *United States*, No. 53, October Term, 1960, upon questions 6 and 7 of the questions presented in the petition.

QUESTION 7.*

2. In the light of the *Campbell* decision, question 7 is re-formulated as follows:

> "The government presented the testimony of three witnesses concerning petitioner's participation in or

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* Question 7 is formulated in the petition as follows:

"7. The government presented the testimony of three witnesses concerning petitioner's participation in or subscription to the program, activities and policies of the Communist Party. The purpose of this evidence was to show the special characteristics of

subscription to the program, activities and policies of the Communist Party. The purpose of this testimony was to prove the special characteristics of membership in the Communist Party as opposed to membership in other organizations. After demand was made for the witnesses' 'statements' under Title 18, U. S. C., Section 3500, the prosecution produced statements of the witnesses relating to the immediate incidents testified about on direct examination but did not produce other statements of these witnesses relating to the program, activities and policies of the Communist Party and its members. The question presented is whether the trial judge erred in ruling that neither he nor the defense might make any investigation behind the prosecution's initial determination as to what documents should be produced under Title 18, U. S. C., Section 3500."

3. The trial judge refused to make or permit any inquiry into the producibility of statements of prosecution witnesses which might have rebutted the prosecution theory that membership in the Communist Party was of such a nature that petitioner should be found to have retained his membership while filing the affidavit. Both the majority and concurring opinions in *Campbell* lay down a different rule than that applied by the trial court. As Mr. Justice Frankfurter, concurring, pointed out, unless it can be said from the record that the statements are "patently not producible", it is the duty of the trial judge to conduct an inquiry into their producibility. The major-

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membership in the Communist Party and the quality of the petitioner's alleged membership. The trial court refused to order the production of any prior statements of these witnesses relating to Communist Party program, activities and policies other than those reports relating to the immediate incidents testified to by the witnesses on direct examination. The question presented is whether the production of the witnesses' statements which relate to the program, activities and policies of the Communist Party was excused under Section 3500 (h) as being beyond the scope of the direct examination."

ity opinion stressed the affirmative duty of the trial judge under Section 3500 to administer the statute so as to secure relevant and available evidence upon which to base his decision as to producibility.

The statements in question here were not "patently not producible." They might well have been useful to the defense for impeachment both as to the witnesses' testimony crediting themselves as government informants of long standing, and as to the nature and quality of Communist Party membership. It was therefore the affirmative duty of the trial judge, once the possibility became apparent that these unproduced statements might be relevant to order their production before him for his determination under the statute.

4. The crux of the difference between this Court's attitude in *Campbell* and the rulings below is that the courts below treated the prosecution's initial determination as a final one. The trial court even forbade inquiry by the defense into the very existence of statements other than the ones produced. (Tr. 193, 194, 196, 200-205, 241-244, 253, 256, 261, 350-351, 489-491.) The Court of Appeals held that under Section 3500, "No protective procedure is established whereby a defendant or the court may determine what statements may exist except the implied protection of the integrity of government counsel and agents." The members of this Court, on the other hand, agreed in *Campbell* that it is the affirmative responsibility of the trial judge to make proper inquiry where a possible question concerning the legal significance of a document was raised in the record, even though the prosecution contended that the document was not producible. *A fortiori* it was error for the trial court to rule that the defense could not even question the prosecution's determination as to producibility.

5. The *Campbell* opinions stress that the responsibility for resolving disputed question as to the legal significance of a document rests with the court and it is the court that must pursue appropriate means for ascertaining the facts relevant to judgment. If defense counsel's demands were overbroad, the trial court's responsibility was not lessened thereby. Since defense counsel had not seen the statements, and was prevented from inquiring as to them, he could not formulate his requests with ritualistic precision. It was the trial court's duty to conduct an investigation *sua sponte* if such appeared to be required. It was not defense counsel's duty to fashion varied demands for particular forms of investigation, particularly where the rulings of the trial court had shown that any demand would be rejected.

QUESTION 6.*

6. The *Campbell* decision is instinct with the obligation of the trial judge to require the production of all the statements called for by Section 3500. So is every relevant decision of this Court. There is no question that the trial judge refused to order the production of statements which were required to be produced. Since it is not known what was in these statements, it cannot be argued that the refusal to order their production was harmless error. *Gordon* v. *United States*, 344 U. S. 414.

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* Question 6 reads as follows:

"Whether the production of statements which report payments to witnesses, as informers, is excused after a complete foundation for their production under 18 U. S. Code Section 3500 is laid, when all that the government has offered to produce at trial is a list of the amounts and dates of payments and there is no evidence as to what other facts are reported in these statements."

CONCLUSION.

For the reasons set forth in this supplemental brief and those previously presented to the Court, the petition should be granted.

Respectfully submitted,

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